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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: OCT 02 2013

Office: TEXAS SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of Professions With Advanced Degree or Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded for entry of a new decision.

The petitioner is a non-profit firm providing long-term rehabilitation care. It seeks to employ the beneficiary permanently in the United States as a physical therapist with a visa classification of an advanced degree professional pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The director determined that the petitioner had not submitted a response to the director's request for evidence (RFE) issued on February 15, 2013. On May 14, 2013, the director denied the petition as abandoned. The sole issue on appeal is whether the petitioner's response to the director's RFE was timely submitted and considered prior to adjudication.

On appeal, the petitioner, through counsel, maintains that the director erred denying the petition as abandoned. Counsel maintains that a response to the director's February 15, 2013, RFE was timely received at the Service Center, but that it was not reviewed before adjudication.¹

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in

¹ The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

the sciences, arts, professions, or business are sought by an employer in the United States.²

In this case, following a review of the materials submitted, it is evident that counsel is correct. The director issued an RFE on October 17, 2012 and on February 15, 2013. Both RFEs permitted the petitioner 87 days from receipt to respond. The 87-day time period for response to the February 15, 2013 RFE fell on May 13, 2013. The record shows that the petitioner's response was delivered to the Service Center on Friday, May 10, 2013.³ However, the director's denial based on abandonment reflects that the response was not in the file at the time of the director's decision.

Therefore, as the petitioner's response was timely and was not considered by the director before adjudication, the director's decision denying the petition as abandoned will be withdrawn. The case will be remanded to the director for further review and entry of a new decision based on the merits of the petition.

ORDER: The director's decision denying the petition as abandoned is withdrawn. The petition is remanded to the director for issuance of a decision on the merits which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

² In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

³ Fed-Ex tracking record shows that the response was delivered on May 10, 2013.